

WILL AN EXPANDED PUBLIC TRUST DOCTRINE LEAD TO BETTER COASTAL MANAGEMENT?

Derived from Justinian civil law and traced through English common law to the American colonies the essence of the Public Trust Doctrine (PTD) is that the waters of a state are a public resource held in trust by the state and available to all citizens equally for the purposes of navigation, commerce, fishing, recreation and similar public uses; and that this trust is not invalidated by private ownership of the underlying land or adjacent land. However, due to such concerns as increased coastal erosion on many beaches primarily because of sea level rise, and shifting ideas about the suitable protection and management of natural and cultural resources fundamental for the public good, the scope of the PTD is expanding. Today, courts are using the doctrine not only to protect uses, but also to prevent the overexploitation of resources, including those having natural, scenic, aesthetic or even economic value. As such, local governments must now consider using PTD concepts when developing coastal management plans, designating protected areas, creating or amending development regulations, and designing habitat protection strategies. This talk will examine the present and future application of the PTD for coastal resource protection and use by focusing on the themes emerging from current case law that can assist local and state coastal planning efforts.

As clarified by the Supreme Court in *Phillips Petroleum v. Mississippi*, the PTD is a state doctrine which is defined and applied differently according to state common law and statutory law.¹ Thus, an expansion of the doctrine, either in its definition or implementation, depends upon a state's use of its sovereign capacity through its courts or legislatures. Since its adoption in the U.S., the doctrine has seen numerous expansions that have been dependent upon circumstances and societal needs. For example, the original three uses to which the PTD applied were fishing, navigation and commerce; especially during the 20th century, recreational purposes came to be specifically recognized in most states as a form of traditional use. Furthermore, some states have expanded the PTD from its original common law form into statutory or constitutional provisions.

Even as the PTD has evolved in recent years, its implementation still requires a balancing of public and private rights. However, legislatures can play an important role in clarifying and implementing the PTD which can ultimately be a great assistance to state and local governments that wish to use the PTD as a stronger tool in coastal management.

Legislatures can assist coastal management agencies in applying a strong PTD by explicitly including the doctrine's mandate in state statutes. For example, in *Leydon v. Town of Greenwich*, the Appellate Court of Connecticut reviewed the relevant legislative act that allowed the Town of Greenwich to "establish, maintain and conduct public parks, playgrounds, bathing beaches and recreation places...as may be necessary or desirable" in order to determine if the act abrogated the public trust doctrine.² The court upheld the application of the doctrine reasoning that the language of the act did not expressively

¹ *Phillips Petroleum v. Mississippi*, 484 U.S. 469 (1988).

² *Leydon v. Town of Greenwich*, 750 A.2d 1122 (2000). Note: *Leydon* was ultimately decided on other grounds; thus, the PTD reference can be viewed as persuasive dicta, rather than binding law, in Connecticut courts. See *Leydon v. Town of Greenwich*, 777 A.2d 552 (2001).

limit the use of town parks and beaches to Greenwich residents, allowing the entire class of state citizens access to the beach.

Similarly, in a recent case in Maine,³ the Conservation Law Foundation challenged the leasing of submerged lands for aquaculture claiming that the State Lands Commissioner should have required a higher standard of reasonableness when determining the impairment of public rights in trust lands. Specifically, the plaintiff maintained that the aquaculture program would interfere with fishing, harbor seals and a horseshoe crab study area. The court found that the legislature, not the Commissioner, must apply a higher standard when it divests public rights to submerged lands for uses such as aquaculture leases. The court noted, however, that the Commissioner did assert conditions in the leases to insure the horseshoe crab area of study and the pupping area for harbor seals were undisturbed.

While it is clear that coastal managers must balance public and private rights, legislatures must do so as well. In 1994, the House of Representatives in New Hampshire requested an opinion of the state Supreme Court regarding a pending bill that would grant a public easement to “dry sand” area which may lie shoreward of the public trust shoreland.⁴ The bill defined this area as extending from the point where the public trust shoreland ends though the commonly used areas of sand and rocks and where the beach and high ground intersect. In New Hampshire, the public trust doctrine is defined as tidewaters of the state, which extend landward to the high water mark as well as lands subject to the ebb and flow of the tide. The court found that if the state was to acquire a public easement for this area, it would necessitate compensation to the property owner as a taking of private property for public use. The court stated that although the state has the right to permit a “comprehensive beach access and use program,” a “strong desire” to improve the public programs does not justify this “short cut” as a way to acquire use of the land without paying for it.

The balance of private and public rights will continue to be a challenge for courts but does not stop with private landowners: when the U.S. Fish and Wildlife Service erected a fence near the shoreline to protect the threatened Piping Plover, it was challenged as an illegal encroachment on the intertidal zone held in trust for the public to access, pass and swim.⁵ The court found that the public’s right to access the shore was unimpeded by the fenced in area, and that the public could still pass and swim within the intertidal zone.

Essentially, the question for greater application of the PTD rests on the process of defining (and potentially expanding) the doctrine and the impairment of existing rights, whether they are constitutionally granted public rights or private landowner rights. As a general matter, coastal managers have more opportunity to liberally apply the PTD if the legislature has declared the doctrine a public policy, but must still balance competing interests (and be ready to defend in potential legal challenges) such as claims of adjacent property owners and the public. This evolving application of the PTD may, thus, result in coastal policies more restrictive to private ownership and more favorable for public use, including

³ *Conservation Law Foundation v George LaPointe*, 2004 Me. Super. LEXIS 131 (2004).

⁴ *Opinion of the Justices (Public Use of Coastal Beaches)*, 649 A.2d. 604 (1994).

⁵ *New England Naturist Association, Inc. v Howard A. Larson*, 692 F.Supp. 75 (1988).

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the alteration of existing zoning boundaries that result in larger coastal areas being designated for communal employment and protection from development.

Paul C. Ticco, Ph.D.
Marine Protected Area Project Manager
Coastal States Organization/NOAA MPA Center
1305 East West Highway, N/ORM
Room 12310
Silver Spring, MD 20910
ph: (301) 713-3155 ext. 242
paul.ticco@noaa.gov

Kristen M. Fletcher
Director, Marine Affairs Institute
Rhode Island Sea Grant Legal Program
Roger Williams University School of Law
10 Metacom Ave., Bristol, RI 02809
ph: 401-254-4613
kfletcher@rwu.edu

Tara Jänosh
Sea Grant Law Fellow
Roger Williams University School of Law
10 Metacom Ave., Bristol, RI 02809
ph: 401-254-4613
tjanosh@cox.net